IN THE

Supreme Court of the United States

October Term, 1961

No. 21

MARIO DiBELLA,

Petitioner,

—v.—

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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Opinions Below

The opinion of the District Court (R. 81a) is reported in 178 F. Supp. 5. The majority and dissenting opinions in the Court of Appeals (R. 93, 106) are reported in 284 F. 2d 897.

Jurisdiction

The judgment of the Court of Appeals was entered November 23, 1960 (R. 115). The order allowing certiorari is dated February 20, 1961 (R. 116). The jurisdiction of this Court rests on 28 U.S.C. §1254 (1).

Questions Presented

In October 1958 Federal Narcotic Agents applied to a United States Commissioner for a search warrant to search petitioner's home, alleging offenses in August and September 1958. The search warrant was refused. A few days later another United States Commissioner issued an arrest warrant. Some five months later, although no new facts unfavorable to the petitioner had appeared, the Agents invaded petitioner's permanent family dwelling in the nighttime, ostensibly to execute the five-months old arrest warrant. Under color of that warrant, the Agents arrested petitioner and then searched the apartment, finding narcotics. The District Court denied petitioner's motion to suppress the seized evidence and the court below affirmed. However, the court below ruled that the arrest warrant was invalid, nevertheless sustaining the search as incident to a lawful arrest which the Agents could have made under the Narcotic Control Act of 1956 (26 U.S.C. §7607) on the basis of the "personal knowledge" shown in the old abortive search-warrant affidavits. The questions presented are:—

1. Irrespective of the existence of "reasonable grounds" for a warrantless arrest under the Narcotics Control Act, was the search nevertheless unreasonable under the Fourth Amendment in the "total atmosphere" of this case, particularly in light of the fact that the search was a nighttime one of a private dwelling without a search warrant and under color of an invalid arrest warrant, and particularly also in view of strong circumstances pointing to the bad faith of the Narcotic Agents in that they were desirous of making a general exploratory search on the pretext of a

stale arrest and to by-pass advance judicial scrutiny of any proposed search?

2. Whether reasonable grounds existed in this case for a warrantless arrest under the Narcotic Control Act.

3. Whether a narcotics agent may enter a suspect's dwelling in the nighttime without a search warrant or a valid warrant of arrest and search the premises.

4. Whether a nighttime entry into a dwelling to arrest a person upon probable cause that he had committed a felony under circumstances where a valid warrant could have been sought is consistent with the Fourth Amendment.

5. Whether the narcotics agent who made this arrest under color of an invalid warrant can subsequently justify the arrest by afterthought reçourse to the Narcotics Control Act; and whether the search incident to such afterthought-based arrest was valid.

6. In light of the rule that probable cause for belief that certain articles subject to seizure are in a dwelling cannot of itself justify a search without a warrant, and in light of the restrictions of the Fourth Amendment in their entirety may a narcotics agent enter a suspect's home in the nighttime ostensibly to make an arrest under color of an invalid arrest warrant or on an afterthought claim of probable cause to believe that a crime has been committed and then as an incident thereto make a search of the dwelling, no special circumstances being shown either for the warrantless arrest or the warrantless search?

7. Whether under the Narcotics Control Act the agents in this case could constitutionally enter petitioner's home in the nighttime and make an arrest and a search as an incident thereto in the absence of special circumstances.

8. Whether an application for a search warrant has been denied by a United States Commissioner and an invalid warrant of arrest executed, is not a search as an incident thereto in violation of the Fourth Amendment?

9. Whether reasonable grounds exist for a nighttime arrest of a suspect in his dwelling when said arrest is made six to seven months after the alleged commission of the crimes of which the agents had sworn some five months before the arrest that they had contemporaneous knowledge.

10. Whether reasonable grounds for a nighttime arrest under the Narcotics Control Act can be predicated upon a hearsay statement made by a narcotics agent to the arresting narcotic agent, the hearsay deriving ultimately from statements by a narcotic dealer not shown to be a reliable informant.

11. Does not a completely judicially untrammeled action of arrest and search on the part of a narcotics agent under the Narcotics Control Act violate the Fourth Amendment?

12. In the absence of proof that the petitioner might flee before a warrant could be obtained, were not his arrest and the subsequent search of his apartment in violation of the Fourth Amendment?

13. Whether the petitioner's arrest was made as a pretext to search his apartment for evidence of contraband.

14. Does the mere fact that an immediate search follows the arrest establish the reasonableness of the search?

15. Does the issue of appealability of the order denying the motion to suppress still have vitality in view of this Court's granting of certiorari without making reference to that issue? If so, was the order appealable to the court below?

Constitutional Provision and Statute Involved

The case involves the Fourth Amendment of the United States Constitution, reading as follows:

ARTICLE IV

> The right of the people to be secure in their persons, houses papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The statute involved is the Act of July 18, 1956, Chapter 629, Title I, §104(a), 70 Stat. 570 (28 U.S.C. §7607), reading in pertinent part:

> "§7607. Additional authority for bureau of narcotics and bureau of customs

> The Commissioner, Deputy Commissioner, Assistant to the Commissioner, and agents, of the Bureau of Narcotics of the Department of the Treasury, and officers of the customs (as defined in section 401(1) of the Tariff Act of 1930, as amended; 19 U.S.C., sec. 1401(1)), may—
>
> • • • • •
>
> (2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in section 4731) or marihuana (as defined in section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation."

Other statutes, which are not directly involved in the case but which have a bearing on the issues of law presented, are cited, discussed or quoted at appropriate places, *infra*.

Statement

This is a search-and-seizure case. The judgment of the court below (R. 115) affirmed an order of the District Court (R. 90a) which denied petitioner's motion (R. 3a) to suppress certain evidentiary items seized in his permanent family dwelling by federal Narcotic Agents in an intensive nighttime search without any warrant for arrest or search. The motion to suppress was made after arrest and arraignment of petitioner but before his indictment (R. 1a, R. 3a, R. 22a-24a, R. 94) and was denied after his indictment

(R. 90a, R. 94); petitioner has not yet been placed on trial under the indictment.[1]

The record before this Court concerning the factual circumstances of the search and seizure consists exclusively of the record of the proceedings in the District Court on the motion to suppress. The motion was argued in that court by counsel for both sides (R. 53a-80a) on the basis of affidavits and counter affidavits (R. 5a-52a). From the showing thus made the following factual situation appeared:

On October 6, 1958, federal Narcotics Agents David W. Costa and David D. Moynihan presented to United States Commissioner Abruzzo in the Eastern District of New York (R. 9a) their respective affidavits to obtain a nighttime search warrant to search the petitioner's dwelling, a five-room apartment in Queens, New York, alleging Narcotic violations by petitioner on August 26 and September 10, 1958 (R. 25a-31a). Commissioner Abruzzo denied the application for a search warrant (R. 51a-52a).[2]

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[1] The appealability of the District Court's order in the Court of Appeals was challenged by the Government in the latter court (where the order was held appealable, R. 94) and in this Court in the proceedings for the granting of certiorari (Govt's. Br. in Opp., pp. 6-7). Since this Court has granted our petition for a writ of certiorari despite the Government's objection as to appealability, we omit discussion of that subject from this opening brief, reserving the appealability issue for treatment in a reply brief in the event that the Government renews its objections.

[2] The aforementioned Costa and Moynihan affidavits had no further operative effect in the happenings of this case until the Government produced the affidavits in the proceedings on the motion to suppress, for the purpose of showing that some five months after the affidavits were executed the contents thereof, *without more*, afforded to the Agents probable cause to arrest the petitioner without a warrant and justified a nighttime search of his dwelling as an incident to such arrest (R. 11a, R. 71a-73a, R. 74a-75a). Further details concerning these abortive "search-warrant" affidavits of Costa and Moynihan are recited at appropriate places below.

Nine days later (October 15, 1958) Agent Costa presented to *another* United States Commissioner in the same Judicial District (Commissioner Epstein) a complaint for a warrant to arrest the petitioner (R. 7a). This complaint stated (R. 7a):

> "That upon information and belief, the defendants, Mario DiBella and Samuel Panzarella, did on September 10, 1958, at Jackson Heights, Long Island, New York, within the Eastern District of New York, unlawfully sell, dispense and distribute a narcotic drug, to wit: approximately one ounce of heroin hydrochloride, a derivative of opium, which said heroin hydrochloride was not in or from an original package bearing tax stamps required by law. (T. 26 U.S.C. Par. 4704(a); T. 18 U.S.C. Par. 2).
>
> That the source of your deponent's information and the grounds for his belief are your deponent's personal observations in this case, the statement of Samuel Panzarella, and other witnesses in this case, and the reports and records of the Bureau of Narcotics."

Upon the basis of this complaint, Commissioner Epstein issued a warrant of arrest (October 15, 1958) (R. 21a-22a).[3]

As more fully recited *infra*, this warrant was held invalid by both the majority and dissenting Judges in the court below (R. 97, R. 105).

After the issuance of the invalid arrest warrant of October 15, 1958, some five months elapsed, during which, so far as appears in this Record, the Government developed no further unfavorable information about the petitioner;

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[3] The actual date of the warrant was October 15, 1958, the date of October 6 on the face thereof being a clerical error (R. 82a).

indeed, there is no affidavit or other proof for the Government in the Record from any person shedding any light on what the Government did or found out about the petitioner during those five months, except for a conclusory averment by Assistant United States Attorney Stewart in his affidavit in the proceedings on the motion to suppress (R. 8a), an affidavit made "upon information and belief" (R. 8a), that "the lapse in time was due to the fact that this investigation was continuing, as other persons were involved" (R. 17a); to similar effect see Mr. Stewart's oral argument before the District Court on the motion to suppress, where he added also that the alleged *interim* investigation during the five-months period mentioned "not proving successful they went ahead and arrested him in the apartment using the old warrant[4] that they had outstanding for his arrest" (R. 75a-76a).

The ultimate carrying-out of the arrest of the petitioner on this stale and invalid warrant of October 15, 1958, occurred on March 9, 1959.

Certain factual features of that arrest, and of the accompanying search, are undisputed:

On March 9, 1959, the Narcotic Agents, from an observation post in a neighboring building (R. 76a), saw petitioner sitting in the living room of his apartment. At 8:15 p.m. Agent Costa, with the warrant of arrest in his possession, went with other Agents to appellant's apartment. It was nighttime. The Agents rang the bell and the door was opened by appellant's stepdaughter. The Agents identified themselves, showed her their credentials, and walked into

[4] *I.e.*, the invalid arrest warrant of October 15, 1958.

the living room, where they identified themselves to appellant, showed him a copy of the arrest warrant, and placed him under arrest. A substantial quantity of narcotics was found elsewhere in the apartment, which, together with other items, the agents seized (R. 9a-10a, R. 76a-77a, R. 95). The other items seized included a suitcase, miscellaneous papers, petitioner's passport, and currency (R. 5a, R. 10a). That the arrest was effected under color of the invalid arrest warrant was confirmed by Agent Costa's return of execution of the warrant (R. 22a).

The foregoing facts, as stated, are undisputed. The affidavits in the proceedings on the motion to supress were in conflict concerning other circumstances of the search:—

First, according to the "information and belief" affidavit of Assistant United States Attorney Stewart (R. 10a): The agents asked petitioner if he would permit them to make a search of the apartment. Petitioner then told one of the agents, "I know what you came for. I have all the stuff in a suitcase in the closet. There's no use tearing the place apart." Petitioner then took the agents to his bedroom where a suitcase was found in the closet, and opened. It contained the narcotics mentioned. Petitioner then stated that this was all the heroin he had in his possession. Approximately $8,675 was found in the apartment, and petitioner later admitted that this money represented profits which he had made in the sale of narcotics. Petitioner also later admitted that he had voluntarily turned over the seized heroin to the agents at the time that they visited his apartment to arrest him.

Second, a reply affidavit filed by petitioner's counsel, Jerome Lewis, contradicted the above Stewart affidavit, and challenged its competency as being founded solely on hearsay (R. 32a-34a). Mr. Lewis' affidavit (which he expressly acknowledged was likewise based on hearsay) stated (R. 33a-34a):

> "Deponent has not submitted counter-affidavits from Jeanne Di Bella [the stepdaughter] and Mario Di Bella for it is deponent's contention that the allegations in the opposing affidavit as to the events of March 9, 1959, should not be considered by this Court for they are inadmissible.
>
> "Deponent has conferred with both Miss Di Bella and Mr. Di Bella and was told by Miss Di Bella that on March 9, 1959, the upstairs bell rang and she opened the apartment door. A man showed her a badge and he and several other men walked into the apartment. They walked right into the living room which is adjacent to the hall corridor where her father was seated.
>
> "Mr. Di Bella informed deponent that the agents came over to him and said they were narcotics agents. They showed him a warrant and said he was under arrest and not to leave the apartment. About six agents remained in the living room with him and four others searched his apartment. He never consented to the search. He never left the living room. He never gave heroin nor money to the agents."

Third, petitioner's own affidavit, filed in support of the motion to suppress (at the outset of that proceeding), averred that the agents "after exhibiting to me a warrant for my arrest * * * proceeded to make a general exploratory

examination of my apartment. They discovered * * * and seized * * * narcotics * * * and divers other items" (R. 5a).[5]

On the day following the arrest and search, petitioner was arraigned before a United States Commissioner and bail was fixed (March 16, 1959) (R. 23a-24a).

Petitioner's motion to suppress the items seized on March 9, 1959, for violation of the Fourth Amendment and of Rules 3, 4 and 41(e) of the Federal Rules of Criminal Procedure (R. 3a), was denied by the District Court. The District Court in its opinion (R. 81a) held that the search was proper as incident to a valid arrest (R. 89a), the Court's reasoning on the question of the validity of the arrest being: (1) that the five-months' old arrest warrant was valid (R. 82a-86a) because Agent Costa's complaint in support thereof (R. 7a—quoted p. 8, *supra*) had included an averment of "personal observations,"[6] and the affidavits in support of the unsuccessful applications for a search warrant (R. 25a-31a)[6] (which likewise had been executed some five months prior to the arrest and search) showed that those "personal observations" of Agent Costa gave him sufficient "personal knowledge" to support his arrest complaint;[7] and (2) that "quite apart from the question

[5] The majority opinion in the court below unexplainedly concluded (R. 95, fn. 1) that this affidavit of the petitioner, depicting a *"general exploratory search"* resulting in *discovery* and *seizure* of property, was "not contrary" to the Government's above-described affidavit (Stewart—R. 10a) depicting a *voluntary disclosure and surrender* of the property by the petitioner. The District Court's opinion made no reference to this phase of the case (R. 81a).

[6] The District Court considered those abortive affidavits as part of the Government's case in opposition to the motion to suppress (R. 83a).

[7] It does not appear that the Commissioner who issued the arrest warrant had been informed about the search-warrant affidavits or their contents (R. 75a).

of the propriety of the issuance of the warrant," the search of March 9, 1959 was proper as one incident to an arrest that "could • • • have" (R. 89a) been made without a warrant, pursuant to the Narcotics Act of 1956 (26 U.S.C. §7607) because the aforementioned search warrant affidavits of October, 1958 showed "that the evidence in the possession of Agent Costa was more than sufficient to give him reasonable ground to believe that DiBella had violated the Narcotics Act on August 26, 1958 and September 10, 1958" (R. 89a; see also R. 86a-89a).[8]

(The circumstances of the latter alleged violations as depicted in the obsolete search-warrant affidavits, to which the District Court—as well as the majority Judges in the Court of Appeals (*infra*)—attached such decisive importance, are described below.)

The majority Judges in the Court of Appeals, while affirming the denial of the motion to suppress, rejected the District Court's conclusion that the arrest warrant was valid (R. 94-97) (the dissenting opinion of Judge Waterman likewise found the arrest warrant invalid, R. 105). The Court of Appeals' reasoning on this issue was that the arrest complaint is:

> " • • • particularly deficient in setting forth the sources of his information or grounds for his (Agent Costa's) belief. True, it recites that his belief an offense had been committed was grounded on his 'personal observations in this case, the statements

[8] The District Court made no reference to the question of the reasonableness of the actual conduct of the search or to the conflicting affidavits relating thereto (R. 81a-89a). Neither of the courts below made any decisionally significant reference to the alleged oral admissions by petitioner (R. 10a), doubtless because no issue affecting the motion to suppress was involved.

> of Samuel Panzarella, and other witnesses in this case, and the reports and records of the Bureau of Narcotics,' but what other sources could there possibly be? Such a shotgun, all-encompassing enumeration is no better than none at all. There is no indication of what he had personally observed, what he had heard from others or what he learned from the reports and records of the Bureau of Narcotics. Neither is there presented the basis for crediting the hearsay of the nameless 'other witnesses' or the unidentified 'reports and records.' The complaint is no better than that in *Giordenello* v. *United States*, and the warrant is invalid for the same reasons."[9]

The majority in the Court of Appeals nevertheless sustained the search as proper incident to a valid narcotic arrest without a warrant pursuant to 26 U.S.C. §7607—reasoning, as had the District Court, that Agent Costa's "personal knowledge" shown in the old search-warrant affidavits (R. 25a-31a) gave him "reasonable grounds" for the arrest within the meaning of the latter statute (R. 97-105).

The majority in the Court of Appeals also found the search itself to be a "reasonable" one (R. 95-96, fn. 1; R. 105)—a point on which the District Court, as seen (fn. 8, *supra*), had made no finding and to which it had not referred at all (R. 81a-89a). This ruling of the Court of Appeals necessarily entailed an evaluation of the conflicting factual versions of the search as averred in the affidavits of the parties in the proceedings on the motion to suppress (R. 5a; 10a, 33a-34a); said affidavits are described and par-

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[9] The Government's Brief in opposition to certiorari raised no issue as to the Court of Appeals' unanimous determination that the arrest warrant was invalid. We therefore treat that determination as part of "the law of the case" in this Court.

tially quoted at pp. 10-12, *supra*, where we noted that the Government claimed the Agents made a consented-to and specifically-aimed search, whereas the petitioner claimed the search was not by consent and was a general exploratory one of his entire apartment.[10]

Judge Waterman, dissenting in the court below, joined with the majority in finding the arrest warrant invalid, and he was of the opinion both that the search could not be justified as incident to a lawful warrantless arrest (R. 105-114) and that the search itself was unreasonable in any event (R. 105, 110-114). Judge Waterman said (R. 106): "* * * we should look at the occurrence * * * with the greater particularity when, as here, the officer, unprotected by a prior valid judicial act, invades a family's permanent domicile in the night-time." Referring to the majority's view that Agent Costa had "reasonable" or "probable cause" to arrest petitioner without a warrant on the basis of the Agent's "personal knowledge" as depicted in the stale and abortive search-warrant affidavits of five months before (R. 25a-31a), Judge Waterman noted the factual contents of those affidavits and the subsequent failure of the Agents to develop any additional information unfavorable to petitioner, as follows (R. 107-108):

> "What evidence is offered in this case to justify a judicial finding that Agent Costa had 'reasonable grounds' (i.e., 'probable cause') to arrest DiBella

[10] Petitioner takes the position in this Court, as he did in the District Court (R. 33a-34a; and see p. 11, *supra*) and in the court below (Appellant's Br. p. 21), that the sole Government affidavit on the question of the *reasonableness* of the search as such (the affidavit of Assistant United States Attorney Stewart who was not present at the search—R. 9a-10a) lacked effective probative value because based entirely on hearsay. See also fn. 8, *supra*.

> without a warrant? Agent Costa had been told of a statement by one Panzarella, a narcotics peddler, to a fellow-agent, Moynihan, a purchaser, that DiBella was Panzarella's source of supply. The only evidence corroborating this hearsay was the fact that Costa had observed that prior to each of two sales DiBella and Panzarella had met in a car. Costa did not observe any transfer of anything between the two men. On the basis of this evidence Moynihan and Costa on October 6, 1958 applied for a warrant to search DiBella's apartment. U. S. Commissioner Abruzzo denied the application. On October 15, 1958 a defective arrest warrant was issued. On March 9, 1959 Dibella was arrested by three agents in the evening as he was sitting in his living room. It is claimed that during this five months' period the agents were awaiting expected additional violations, but Agent Costa could not point to a single incident in that five months' period which added to the evidence presented to Commissioner Abruzzo and from which Commissioner Abruzzo could not find probable cause to issue a search warrant."

Judge Waterman found also that the lapse of some five months between the time of the events which the majority thought gave rise to a reasonable belief in appellant's guilt, and the time of the arrest and search, "casts further doubt" on the validity of both that warrantless arrest and the subsequent search owing to the staleness of the information, which moreover had judicially been found "insufficient to justify the issuance of a warrant to search those very premises at a time when the information was not stale" (R. 109-110).

As above stated, Judge Waterman found distinct reason for invalidating the search in and of itself, apart from

questions of the lawfulness of the arrest. In this branch of his reasoning Judge Waterman put the issue as follows (referring *inter alia* to *Harris* v. *United States*, 331 U. S. 145, and *United States* v. *Rabinowitz*, 339 U. S. 56) (R. 110-112):

> "• • • The mere fact that a search immediately follows a valid arrest does not conclusively establish the reasonableness of that search. • • • A long and inconsistent series of cases has attempted to define the permissive area of a valid search incidental to an arrest.
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> • • • • • •
>
> "• • • we can discern a pattern that has eroded the homeowner's right to personal privacy in his dwelling to the point where it would seem that the entire home is subject to search by the police if armed with a valid warrant for the homeowner's arrest. • • • Therefore, now, as a result of this steady erosion, on the authority of *Harris*, as resurrected by *Rabinowitz*, a prisoner's apartment may be lawfully searched without a search warrant as incidental to his lawful arrest, unless the prisoner's situation is meaningfully distinguishable from that present in those cases. Two factors distinguish the instant case."

Judge Waterman then stated the distinguishing factors (R. 112, 113):

> "• • • First, in *Harris* and *Rabinowitz* a *valid* warrant of arrest had been issued. Thus there had been a proper decision by a disinterested magistrate that probable cause of guilt existed. No valid warrant issued here. There is no Supreme Court case upholding the officers' acts where a home was searched

by officers armed with neither an arrest warrant nor a search warrant.

* * * * *

"Second, in further contrast to *Harris* and *Rabinowitz*, Dibella's arrest and the subsequent search of his residence occurred in the night-time.* * *"

Judge Waterman, in concluding his separate opinion, said (R. 113-114):

"Thus, it is clear that the majority is not merely applying the rationale of *Harris* and *Rabinowitz*, but is amplifying and extending the doctrine of those cases.* * * Nor do I find persuasive the argument that such searches are necessary for the effective control of narcotics traffic. Justice Jackson, speaking for the Court, disposed of this argument in *United States* v. *Di Re, supra*, at 595:

* * * * *

"Appellant DiBella was sitting in his living room one night when Agent Costa together with other agents entered and arrested him on the most specious of stale grounds. This arrest then became the basis of an exhaustive search of appellant's home.[1] To condone such activity "is to make the arrest an incident to an unwarranted search instead of a warrantless search an incident to an arrest." *United States* v. *Rabinowitz, supra*, at 80 (Frankfurter, *J.*,

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"[1] There is no agreement as to the number of agents who participated in the arrest and search. But there were at least five. The government affidavit admits to five, and identifies these five by name. Two of them accompanied Costa at the time of the initial entry. Two more then joined these three when the search began. I suggest that this was more than enough manpower to make the simple arrest and that the agents' real purpose in entering DiBella's apartment was to conduct a search there without first applying for and obtaining a search warrant."

dissenting). To approve the officers' acts here is to take another long step away from the original concepts of ordered liberty expressed in the Fourth Amendment. I would suppress the evidentiary material seized by the agents."

Summary of Argument

1. Taken in their entirety and in their overall incidence upon the petitioner's Fourth Amendment rights, the circumstances of the arrest and search point to an unreasonable search and seizure. Our primary contention before this Court is that the conduct of the Government agents when thus viewed in its entirety was unconstitutional irrespective of the answer to the narrower question of whether the arresting agents at any time had "reasonable grounds" for a hypothetical arrest under 26 U.S.C. §7607. The answer to the latter question cannot affect the issue of constitutionality in the overall aspect mentioned, for at least two reasons: even if such "reasonable grounds" arguably existed when the agents' information was fresh, the "grounds" had staled by the time of the belated arrest and search, and this staleness takes on a significance *a fortiori* when the case is viewed as being not merely one of a stale arrest but of a warrantless search tacked onto the stale arrest; the second reason is that the overall constitutional dubiousness of the agents' conduct occurs here in the most sensitive of all Fourth Amendment search settings, namely a nighttime search of a private family's permanent dwelling. The authorities relating to stale arrests are collected in the dissenting opinion of Judge Waterman in the court below (R. 109-110); and see *Carlo* v. *United States*, 286 F. 2d 841, 846 (C.A. 2, 1961). The

preferred status of private dwellings in the Fourth Amendment search area is best shown by the fact that there is no case in this Court approving a search of a home where the officers had neither an arrest warrant nor a search warrant. *Harris* v. *United States*, 331 U. S. 145, and *United States* v. *Rabinowitz*, 339 U. S. 56, which are thought to go farthest in allowing search of fixed premises incident to an arrest, are readily distinguishable; both cases involved valid arrest warrants, neither (so far as appears) involved a nighttime search or any element of staleness, and *Rabinowitz* did not even involve a home, but an office open to the public. Indeed, the *Rabinowitz* formula of looking to "the total atmosphere of the case" best expresses our above mentioned chief theme herein that the search of petitioner's home was unconstitutional by reason of the overall circumstances of the conduct of the officers.

2. The provision of the Narcotics Control Act of 1956 (26 U.S.C. §7607) allowing arrests without a warrant can be of no assistance to the Government in overcoming the Fourth Amendment violations here presented. Even if the mere afterthought character of the Government's resort to this statute be deemed constitutionally unoffending in the overall circumstances of the case, the statute is nevertheless unavailing for the Government's purposes because the legislative history conclusively shows that the power to make arrests without a warrant was being given to narcotic agents solely to take care of situations of emergency or other special necessity, no such circumstances being shown in this case; indeed it would be difficult to conceive of a case more remotely removed from any such circumstances of emergency or special necessity than is this one. The

legislative history materials are presented at pages 34-36, *infra*.

3. While, as above noted, the case need not turn decisively on the technical question of whether the arresting agents had "reasonable grounds" for a hypothetical arrest without a warrant, no such grounds in any event existed to make the arrest at the time it was made. The factor of staleness once again comes into the picture, but even without that factor the "grounds" were inadequate viewed as of any prior time when they were fresher. Analogies drawn from cases like *Draper* v. *United States*, 358 U. S. 307 and *Jones* v. *United States*, 362 U. S. 257 are inapt here if only because this case at no time has involved a "reliable informant" as the source of the agents' hearsay affidavits.

ARGUMENT

POINT I

The motion to suppress should have been granted because, in their entirety and in their over-all incidence upon petitioner's fourth amendment rights, the circumstances of the arrest and search point to an unreasonable search and seizure.

A. Introductory

For the resolution of the question of the constitutionality of the search and seizure in this case we respectfully invoke the method of inquiry referred to in *Rios* v. *United States*, 364 U. S. 253, 255, viz., "a particularized evaluation of the conduct of the officers involved". More specifically, we invoke the principle that:

> "* * * the test [of reasonableness under the Fourth Amendment] should not be limited to examination of arresting officers' conduct in making the arrest. Their conduct prior to the arrest is no less relevant. * * *" (Frankfurter, J., dissenting in *United States* v. *Rabinowitz*, 339 U. S. 56, 84)[11]

Putting it in another way, our purpose in this Point I is to show that the constitutional aggrievement in this case is greater than the sum of its parts;[12] that, apart from such analytically separate segments of the case as those relating to the existence of "reasonable grounds" for a warrantless arrest under the Narcotic Act of 1956 (26 U.S.C. §7607), or the reasonable scope of the power to search incident to a lawful arrest, the case taken in its entirety is one of manifestly unreasonable search and seizure; and that, indeed, an affirmance herein by this Court would set a new high-water mark for the search powers of police officers in derogation of the Fourth Amendment—for, as Judge Waterman put it in his dissenting opinion in the court below, "There is no Supreme Court case upholding the officers' acts where a home was searched by officers armed with neither an arrest warrant nor a search warrant" (R. 112).

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[11] The authoritativeness of this principle does not depend, of course, solely on the dissenting opinion which we have quoted. The Court customarily examines the record facts in search-and-seizure cases in the comprehensive manner suggested by Mr. Justice Frankfurter's dissent in *Rabinowitz, supra*. *E.g.*, *Henry* v. *United States*, 361 U. S. 98; *Jones* v. *United States*, 362 U. S. 257; *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344.

[12] *Cf. United States* v. *Rabinowitz*, 339 U. S. 56, 66 ("That criterion [Fourth Amendment reasonableness] * * * depends upon * * * the total atmosphere of the case.").

B. Resume Of The Fourth-Amendment Incidences Of The Government's Conduct In This Case.[13]

First, for the purposes of "particularized evaluation" of the constitutionality of the search in this case, the relevant circumstances *immediately attendant upon the search itself* include the facts that the search was—

(1) in a private family's permanent dwelling;[14]

(2) in the nighttime;[15]

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[13] Our "resumé" citations of authorities in this subheading "B" are expanded under subsequent headings where several of the points of law involved are necessarily treated in more detail.

[14] The specially protected status of dwellings under the Fourth Amendment in regard to searches is expressly recognized, *e.g.*, in *Chapman* v. *United States*, — U. S. —, 81 S. Ct. 776, 779; *Jones* v. *United States*, 357 U. S. 493, 498-500; *Johnson* v. *United States*, 333 U. S. 10, 14; *Agnello* v. *United States*, 269 U. S. 20, 32; *Carroll* v. *United States*, 267 U. S. 132, 147, 153. Especially memorable is the Court's painstaking differentiation in the case last cited (*Carroll*) between the emergency searches that may have to be countenanced for vehicles, etc., and the absence of such justification in cases of fixed premises. Noteworthy also is the fact that *United States* v. *Rabinowitz*, 339 U. S. 56, in easing the Fourth Amendment restrictions for searches of fixed premises without a search warrant, dealt not with a *dwelling* but with an *office* open to the public; besides, *Rabinowitz* involved an indisputedly valid arrest warrant and a *daytime* search.

[15] In footnote 22, p. 28, *infra*, we note the special nighttime search provision of the Narcotic Act of 1956 (18 U.S.C. §1405), and we there remark upon its doubtful constitutionality. In any event, the provision is not operative in this case because no search warrant pursuant thereto (indeed, no search warrant of any kind) was ever issued herein. It is therefore pertinent to refer to the traditionally disfavored status of nighttime searches as codified by F. R. Cr. P. Rule 41(c) and to the decisions which recognize that tradition. *E.g.*, *Jones* v. *United States*, 357 U. S. 493, 498-499 (commenting with special severity upon "nighttime intrusion upon a private home" and remarking that F. R. Cr. P. 41(c) "is hardly compatible with a principle that a search without a warrant can be based merely upon probable cause."); *Davis* v. *United States*, 328 U. S. 582, 592-593 (repeatedly emphasizing that the search involved was dur-

(3) without a search warrant;[16]

(4) not incident to execution of a valid warrant of arrest;[17] and

(5) conducted unlimitedly throughout the entire space of the dwelling by at least five agents, i.e., not confined to the person of the petitioner or to objects or space within his immediate control. (R. 114, fn. 1)[18]

Second, for the purposes of such "particularized evaluation" concerning the conduct of the officers *prior to the arrest and search*, the relevant circumstances include facts pointing to the bad faith of the officers, *i.e.*, that their real

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ing "business hours"); *Hanna* v. *United States*, 260 F. 2d 723, 725 (C.A. D.C. 1958); *Wrightson* v. *United States*, 222 F. 2d 556, 560 (C.A. D.C. 1955); *Calabonette* v. *United States*, 208 F. 2d 264 (C.A. 6, 1953); *Distefano* v. *United States*, 58 F. 2d 963 (C.C.A. 5, 1932). See also "Notes" 32-35 in U.S.C.A. Anno. to F. R. Cr. P. 41. In view of the foregoing, there would seem to be little force in the Government's statement in its brief in opposition to certiorari herein (p. 9) that " * * * this Court has never indicated that the validity of an arrest at nighttime depends upon any greater showing than the probable cause necessary for arrest at any other time". It is the combination of the *search* and the arrest to which it is incident that presents the issue of Fourth Amendment reasonableness here. Rule 41(c), it should not be forgotten, was promulgated under the authority of this Court.

[16] As noted by Judge Waterman in the court below (R. 112), there is no case in this Court upholding the search of a home by officers having neither an arrest warrant nor a search warrant.

[17] *Ibid.*

[18] *Cf. Go-Bart Importing Co.* v. *United States*, 282 U. S. 344; *United States* v. *Lefkowitz*, 285 U. S. 452. See also Mr. Justice Frankfurter's analysis in *United States* v. *Rabinowitz*, 339 U. S. 56, 72-76 (dissenting op.) of the question as to the reasonableness of a search which is sought to be justified by the factor of the closeness of the items to the person of the suspect. Both of the conflicting versions of the physical circumstances of the search in this case (R. 5a, 10a, 32a-34a) indicate that the search went far afield indeed from the immediate physical area under the petitioner's actually effective control.

motive was to make not an arrest but a general exploratory search[19] free of advance judicial scrutiny:[20]

(1) The invalid arrest warrant had remained unexecuted for some six months. This occurred through the voluntary choice of the officers, *i.e.*, there is no claim that the warrant could not have been executed at any time in the interim. While the Government claimed (solely by affidavit of the Assistant United States Attorney, not by any affidavit or testimony from any of the arresting or searching Agents or from any other Agent assigned to the investigation) that the arrest was deferred in hopes of uncovering other implicated persons (R. 17a), the Government also admits that these hopes remained unfulfilled at the time of the search (*ibid*), and it makes no claim of having turned up any new unfavorable information about the petitioner prior to the search and arrest. Cf. the emphasis on the absence of proof of recent violation in *Go-Bart* v. *United States*, 282 U. S. 344, 357-358. In fact, the Government saw fit not to put into the record of the proceedings on the motion to suppress *any* affidavit or testimony from *any* of the Narcotic Agents on *any* phase of the case, except the abortive old search-warrant affidavits made five months before the search and arrest (R. 25a-31a). Cf. the rule as to the Government's burden of proof in search-and-seizure cases as stated in

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[19] The principle condemning such searches is recognized even by *United States* v. *Rabinowitz*, 339 U. S. 56, 62 and *Harris* v. *United States*, 331 U. S. 145, 149-150, 153. See also, *e.g.*, the *Go-Bart* and *Lefkowitz* cases cited in fn. 18, *supra*; *Marron* v. *United States*, 275 U. S. 192, 195; *Gouled* v. *United States*, 255 U. S. 298, 309; *Boyd* v. *United States*, 112 U. S. 616, 623-624.

[20] *Cf.* Judge Waterman's dissenting opinion in the court below (R. 114): "* * * To condone such activity 'is to make the arrest an incident to an unwarranted search instead of a warrantless search an incident to an arrest.'"

McDonald v. *United States*, 335 U. S. 451, 455-456. This long delay in executing the invalid arrest warrant,[21] accompanied by no satisfactory probative explanation for the delay or for the choice of the particular time of the actual arrest and search by a far larger number of agents than were conceivably needed for accomplishing the arrest, is a weighty factor in showing the officers' bad-faith motivation to by-pass judicial safeguards against a general exploratory search of petitioner's entire dwelling in the nighttime.

(2) Further attesting the officers' bad-faith motivation (and, we are obliged to point out, reflecting dubiously also upon the Government's position in defending the officers' conduct), is the fact of the officers' knowledge, at the time of the search, that a search warrant had been judicially denied to them five months previously upon the very same averments (in the old search-warrant affidavits—R. 25a-31a) now claimed to have justified the warrantless arrest to which is sought to be "tacked" the warrantless search.

(3) The Record is barren on the question of why the agents did not, or could not, apply for another search warrant or arrest warrant or both, prior to the arrest and search. There is no showing of any need for speed in making the arrest or search on the night of March 9, 1959. There is no claim of anticipated flight of petitioner or of anticipated disposal by him of any contraband or evidentiary items. Cf. *Jones* v. *United States*, 357 U. S. 493, 499-500, anticipating the "grave constitutional question" that "would confront" the Court in a case involving a "force-

[21] The authorities pertaining to the issue of such delay were noted by Judge Waterman in the court below (R. 109-110) and are more extensively presented in this brief at pp. 42-45, *infra*.

ful nighttime entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought * * *." In emphasizing the circumstances above recited in this paragraph, we are not unmindful of the overruling of *Trupiano* v. *United States*, 334 U. S. 699 (requiring a search warrant on the basis of the "practicability" of procuring it although the search is sought to be justified as incident to a valid arrest) by *United States* v. *Rabinowitz*, 339 U. S. 56, 66; we do not understand that *Rabinowitz* excludes absolutely and unqualifiedly all consideration of the *relevancy* of the test of "practicability" which *Trupiano* treated as *decisive;* that is, under the theme of the "total atmosphere of the case" which *Rabinowitz* prefers as the test of Fourth Amendment reasonableness, the "practicability" issue presented upon our facts seems to us important in the overall circumstances of this particular case.

(4) The official disregard for Fourth Amendment restrictions in this case appears in an especially striking light when the circumstances preceding the search are considered together with those which followed it. The arrest was undisputedly made under color of the invalid warrant of arrest—the stale warrant which was five months old and had been obtained upon averments (R. 7a) incomparably less adequate than those (R. 25a-31a) upon which the search warrant had been refused (by another United States Commissioner) just around that same time. In the proceedings on the motion to suppress, the Government's attorney, in open court, disassociated himself from that stale arrest warrant with a frank expression of distaste for it ("I am very sorry that the warrant was ever issued, but it

is too late"—R. 78a), but he argued that the search of March 9, 1959, was nevertheless lawful on the ground that the arrest "could have" (*ibid*) been made without a warrant under 26 U.S.C. §7607 because Agent Costa had the statutory "reasonable grounds" to believe petitioner was guilty of the offenses attributed to him in the abortive search-warrant affidavits of September, 1958 (R. 25a-31a). Thus, in a case where a judicial officer five months earlier had expressly declined to find probable cause (for a search),[22] when furthermore the only arrest warrant in the case was long-since stale and was in effect disavowed by the Government in open court (and was ultimately found invalid by the court below), and where absolutely nothing is adduced by the Government by way of fresh or additional justification for either arrest or search five months later, the stale arrest and the sweeping exploratory nighttime search of a private dwelling made incident thereto are opportunistically sought to be justified by an afterthought reliance on a hypothetical warrantless arrest that "could have" been made under supposed statutory authority. If this were a case in which the overall pattern of the conduct of the Government's officers did not so overwhelmingly negate the good faith of their post-factum reli-

[22] The Fourth Amendment requirement of probable cause applies, of course, to both arrest and search warrants. *Giordenello* v. *United States*, 357 U. S. 480, 485-486. And it is important to note that the refusal of the search warrant in September 1958 cannot be explained as due to the request for a *nighttime* warrant, because it is to be presumed that the Commissioner knew the provisions of 18 U.S.C. §1405 (adopted as part of the Narcotic Act of 1956) permitting nighttime search warrants in narcotic cases free of the restrictions of F. R. Cr. P. Rule 41(c) as to "positive" averments concerning the location of property sought by the search. *Query*, whether 18 U.S.C. §1405 is itself constitutional or could have any constitutional impingement on a case like the instant one. As noted in our fn. 15, p. 23, *supra*, the latter statute has had no actual operation in this case.

ance on a power of warrantless arrest, if it were a case of convincingly good-faith Government action to dispense with an arrest warrant on *some* basis of needful practicability and with *some* show of non-staleness, if it were not instead simply a case of opportunistic afterthought rationalization to justify brushing away the constitutional "inconveniences" which the Agents had in fact already experienced in this very matter when they were refused a search warrant, the Government could contend with better constitutional grace for its right to stand on a warrantless arrest under 26 U.S.C. §7607.

(5) One of the issues on which the majority Judges and Judge Waterman disagreed in the court below was whether in fact Agent Costa had "reasonable grounds" under 26 U.S.C. §7607 to make a hypothetical warrantless arrest on March 9, 1959 (R. 97-105, 105-110). The majority found that the old search-warrant affidavits showed the Agent had sufficient "personal knowledge" for this purpose consisting of his asserted knowledge of the alleged offenses of August and September 1958 (R. 97-105). Judge Waterman concluded (R. 105-110) that Agent Costa's aforesaid "knowledge" was insufficient because it consisted of hearsay originating with a narcotics peddler (Panzarella) who was an alleged customer of petitioner corroborated solely by Costa's observation of petitioner in the company of Panzarella prior to two sales made by the latter to Moynihan, a Narcotic Agent colleague of Costa's—it being nowhere shown that Panzarella was a "reliable informant" or a "trustworthy 'special employee'" (R. 107-108). Cf. *Draper* v. *United States,* 358 U. S. 307, 312-313; *Jones* v. *United States,* 362 U. S. 257, 269-271. Petitioner's position concerning this issue of Agent Costa's "reasonable

grounds" for a warrantless arrest is that, even if this Court agrees with the majority Judges of the court below that Costa did have such grounds, the search was unreasonable for all of the other reasons enumerated in our preceding pages, *i.e.*, unreasonable when tested in the "total atmosphere" of the case. To be sure, we do also urge that, as Judge Waterman below concluded, Agent Costa did not have such "reasonable grounds", a topic which we treat separately in our Point II, *infra*, and on that additional basis we respectfully maintain that there could be no valid warrantless arrest, hypothetical or otherwise, in this case on March 9, 1959, under the supposed authority of the Narcotic Control Act of 1956 (26 U.S.C. §7607). We maintain also (see our full argument on the point at pp. 38-45, *infra*) that neither the latter statute nor any conceivable statute could *constitutionally* justify the (hypothetical) warrantless arrest and the subsequent search incident thereto in this case under all the circumstances presented, because no statute could constitutionally put into the hands of police officers the "very dangerous amalgamation of powers" (cf. *Giles* v. *United States*, 284 Fed. 208, 214 (C.C.A. 1, 1922)) that would thereby arise. For the circumstances presented, in their overall aspect as above shown, are ones in which the United States Commissioner is "evicted from his judicial function" (*ibid*), and the Narcotics Agent in effect becomes the judge of the existence of probable cause, making the arrest whenever he pleases and as an incident thereto searching a suspect's dwelling whenever he desires, irrespective of the time of day.

Turning now to a more detailed treatment of the pertinent legal authorities which bear upon the above described overall incidences of the search in this case, we treat first

the questions relating especially to the Narcotics Act of 1956.

C. The Provision Of The Narcotic Control Act Of 1956 Allowing Arrests Without Warrant Upon "Reasonable Grounds" (26 U.S.C. §7607) Does Not Confer Any Greater Power On Narcotic Agents Than Is Enjoyed By Other Federal Arresting Officers Having Statutory Power To Make Arrests Without Warrant. The Constitutional Test Of Probable Cause Is Not Overborne By Such Statutes. To Give The Narcotic Act The Effect Needed In Order To Sustain The Government's Over-All Conduct In This Case Would Be To Make That Statute Superior To The Fourth Amendment. That Congress Had No Such Intention Is Amply Shown By The Legislative History Of The Statute.

Nothing is more essential for the proper disposition of the constitutional issues of this case than the preserving of the correct perspective as to the effects herein of the provision of the Narcotic Control Act of 1956 which allows arrests without a warrant (26 U.S.C. §7607). This statute (quoted at pp. 5-6, *supra*) is no "Open Sesame" for the federal narcotic police in their perennial striving towards some autonomous or sovereign kind of preferred constitutional status in the area of arrest an . search.[23]

The circumstances of this case are a sobering illustration of the way in which the Federal Narcotic Bureau aggrandizingly administers the 1956 arrest provision. The aggrandizing thrust in this case is the more disquieting

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[23] In the Congressional debates on the bill which became the Narcotic Control Act of 1956 (see our full discussion of the legislative history of the statute, *infra*) the theme above referred to, namely, the persistent effort of the Federal Narcotic Bureau and its proponents, to expand the "enforcement" powers of that agency, was impliedly noted with expressions of the strongest concern by Senators Lehman and Morse. *E.g.*, 102 Congressional Record (84th Congress, 2nd Session), pp. 9034-9047, 9251, 9302-9304.

because of the almost off-hand manner in which the 1956 provision is invoked, *i.e.*, the afterthought character of the Government's reliance in this cas on 26 U.S.C. §7607 as a means of rescuing a situation that the agents had mishandled. Both the original mishandling, and the afterthought attempt at rehabilitation of the situation, arise from an official attitude of implicit supra-constitutionalism.

As respects what we have termed the afterthought character of the Government's reliance on 26 U.S.C. §7607, the few judicial expressions which we have been able to find concerning governmental pretensions of this sort are worth noting. We are aware, of the *dictum* in *Giordenello* v. *United States*, 357 U. S. 480, 488 that, although the arrest warrant involved was held invalid, "this is not to say, however, that in the event of a new trial the Government may not seek to justify petitioner's arrest without relying on the warrant". The *Giordenello* arrest situation, however, was a far different matter from the present one. There the invalid arrest warrant was based on a complaint alleging an offense occurring on the very same day that the warrant was issued (357 U. S. 481); and the warrant was executed on the very next day (357 U. S. 482). Nor did it appear in *Giordenello* (as we maintain it does here) that "reasonable grounds" for the arrest did not exist in any event. The "total atmosphere" in *Giordenello* bears no faintest resemblance to that in our case.

Much more to the point, we submit, on the question of the Fourth Amendment incidence of such "afterthought" reliance on warrantless arrests that "could have" been made, are the following cases:

In *Jones* v. *United States*, 357 U. S. 493, the agents had a daytime search warrant and no arrest warrant. They

did not use their daytime search warrant. The Court found that, on the record, the Government's action had depended not on any search incidental to an arrest but on an assertion of probable cause as to commission of an offense and existence of contraband, and this afterthought rationalization the Court declined to accept. In *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, the Court disapproved a search mainly as being of unreasonable scope; while it also observed that the prohibition agents had sufficient information to make an arrest without a warrant, nevertheless it disapproved the search for the additional reason that it was incident to an invalid warrant of arrest. In *United States* v. *Pollack*, 64 F. Supp. 554, 558, (D.N.J., 1946—per Forman, *J.*), the Court likewise rejected a similar "afterthought" attempt by the Government to rely on an unused and claimedly valid authority to make an arrest.

In the present case, in its Brief in Opposition (p. 9), the Government has cited *Stallings* v. *Splain*, 253 U. S. 339, 342, and *United States* v. *Rabinowitz*, 339 U. S. 56, 60, for the proposition that "* * * this Court has indicated that, even when law enforcement officers have made an arrest pursuant to a warrant which was later found insufficient to authorize it, nevertheless the arrest is valid as long as the officers in fact had probable cause". However, in *Stallings*, the original arrest process was held lawful, hence any expression in the case on the permissibility of an afterthought arrest on other grounds would be *dictum*. Even as to such *dictum*, however, the only bearing of the *Stallings* case on the issue is in the factual peculiarities of that case, *i.e.*, it involved the circumstance that, subsequent to the original arrest, new and additional legal cause for detain-

ing the prisoner had arisen (through the institution of removal proceedings) (253 U. S. 343). As regards the Government's citation of the *Rabinowitz* case on this point, it is of even less avail than the *Stallings* case, for the only supposedly pertinent reference in *Rabinowitz* (339 U. S. 60) is to the power of making an arrest upon probable cause that a felony was being committed *in the very presence of the arresting officers.*

All of which reflects the well-known fact that nothing in the decided cases dealing with the meaning of "reasonable grounds" under the Narcotic Act permits any other conclusion than that the statutory test stated in those words is the same as the test of "probable cause" under the Fourth Amendment. *E.g., Draper* v. *United States*, 358 U. S. 307, 310, fn. 1; *United States* v. *Kancso*, 252 F. 2d 220 (C.A. 2, 1958); *United States* v. *Volkell*, 251 F. 2d 333 (C.A. 2, 1958), cert. den. 356 U. S. 962.

The legislative history

The legislative history of the Narcotic Control Act of 1956 (26 U.S.C. §7607) confirms that Congress had no intention of creating a form of the arrest power that would mark any new extension whatsoever into the area protected by the Fourth Amendment. On the contrary, the legislators were told by the chief sponsor of the bill that narcotic agents were simply to be given powers of warrantless arrest equivalent to those already permitted to other federal officers.[24] Thus, in presenting the legislation on the floor

[24] The Narcotic Act arrest provision in question is therefore to be deemed to have been modeled after statutes none of which import any power of arrest inconsistent with the "probable cause" requirement of the Fourth Amendment. Those statutes are 8 U.S.C. §1357 (in connection with which see 8 U.S.C. §1324) (immigration and naturalization officers); 14 U.S.C. §89 (Coast Guard); 18 U.S.C. §3052 (F.B.I.) and §3053 (United States Marshals) (see also 18 U.S.C. §3054-§3056, inclusive); 26 U.S.C. §7608 (Internal Revenue Officers).

of the Senate, Senator Daniel stated, concerning the new arrest provision, not only that "the purpose is to give these law enforcement officers status comparable to that now held by agents of the Federal Bureau of Investigation and other federal enforcement officers", but he also went much farther in reassuring the Senate by depicting the provision as one limited to a right to "make arrests without warrant for violations *committed in their presence*". 102 Congressional Record (84th Congress, 2nd Session) 7284.[25] Senator Daniel also obtained leave to read into the record a "Report of Inter-departmental Committee on Narcotics to the President (February 1, 1956)," which made it particularly explicit that the prime purpose of the sponsors of the proposed new arrest provision for narcotics cases was to enable the agents to deal effectively with those violations as to which emergency action is necessary: "Even the shortest delay incident to obtaining a warrant from a magistrate under the most favorable circumstances would be fatal to many narcotic cases. Much of the business is in neighborhoods where alarms are quickly spread; much of the activ-

[25] Senator Daniel was speaking of the bill S. 3760, whose section 1408 was in all substantial respects identical with the law as finally adopted. 102 Congressional Record, p. 7285. In connection with Senator Daniels' above noted over-simplified description of the proposed provision as one seemingly dealing only with violations committed in the presence of narcotic agents, see the inartistic language of a report by the Sub-committee on Improvements in the Federal Criminal Code of the Senate Judiciary Committee, which was read into the Congressional Record during the debate, and where the following peculiarly-phrased statement appears: " * * * when federal agents see the violation occur or have probable cause to believe that it is occurring, and in cases of consent searches, the agents should be permitted to make arrests without search warrants, * * * ". 102 Congressional Record 9014, columns 1-2. Later in the debate, Senator Daniel again told the Senate that the purpose of the proposed new arrest provision was to allow narcotic agents "to proceed in the way that other law enforcement officers are now required to do". 102 Congressional Record 9016.

ity of narcotic criminals is in the nighttime and on weekends, or at other times when a magistrate cannot be reached without delay". 102 Congressional Record 9017, at 9020.[26] The reports of the Senate and House Committees, and of the Conference Committee, shed no further significant light on the legislative intent, with the single exception of House Report No. 2388 which echoed the idea that the proposed new arrest (and search) provisions were needed to deal with emergency situations: " * * * the enforcement officers have been required to secure an arrest warrant, even though circumstances indicate the impracticability of such a procedure. The delay involved in obtaining the warrant permits the destruction or removal of the narcotic evidence and allows the narcotic traffickers to escape prosecution for their crime. * * * " House Report No. 2388, 84th Congress 2d Session, printed in U. S. Code Congressional and Administrative News (84th Congress 2d Session, 1956) pp. 3274 at 3283.

The foregoing is believed to be all of the legislative history material that is of pertinence for present purposes.

Both the text and the legislative history of 26 U.S.C. §7607, then, and the few pertinent judicial expressions which have appeared on the subject, point inescapably to the conclusion that this provision for narcotic arrests without a warrant was never intended to place in the hands of the narcotic agents an untrammeled discretionary authority to utilize such arrest powers indiscriminately in any

[26] While the statement above last quoted may ambiguously have referred to both search warrants and arrest warrants, the distinction was not made clear in the text of the quoted report. The fact remains that the legislators were being told that the proposed new powers were needed for emergency cases.

case where probable cause exists to believe that an offense has been committed, irrespective of its remoteness in time, or irrespective of all other surrounding circumstances of the case which would favor applying for a warrant. The legislative intent could scarcely be more explicit that the new power was being given to narcotic agents in order to meet the practical necessities of those cases where the obtaining of an arrest warrant might not be readily feasible or safe and the quarry might escape apprehension in the meantime.

It would, therefore, appear that the mere existence of 26 U.S.C. §7607 cannot in itself exert one iota of legal force to validate a narcotic arrest which, in the absence of that statute, would be violative of the Fourth Amendment. Congress did not and could not have contemplated what the Fourth Amendment would not countenance, the fearsome "amalgamation of powers" that is portended by the use sought to be made of 26 U.S.C. §7607 in this case of a warrantless nighttime search of a private dwelling incident to a warrantless arrest.

D. Since The Narcotic Act Of 1956 Adds And Can Add Nothing To The Validation Of The Over-All Fourth Amendment Incidences Of The Search In This Case, The Search Is To Be Tested By The Same Constitutional Standards As In Non-Narcotic Cases. Affirmance Of The Judgment Below Would Require An Extension Of The Right Of Search-Incident-To-Arrest That Would Be Without Precedent In The Decisions Of This Court And Would Reduce The Fourth Amendment To Its Lowest Ebb As A Protection For The Peoples' Private Dwellings Against Unreasonable Searches, Including Those Conducted In The Nighttime And Those Without Any Advance Judicial Approval Of Any Kind.

We note once again Judge Waterman's observation in his dissenting opinion in the court below (R. 112) that there is no decision of this Court approving a search of a private home where the officers had neither an arrest warrant nor a search warrant. What is there about this case that commends it to this Court as the vehicle for approving such a species of search for the first time in the Court's history? Not only does the case lack any special circumstances whatsoever favoring its selection for this extraordinary purpose, but on the contrary, it presents overwhelming circumstances which render it positively repellent for such purpose. Let us compare this case on its facts with the leading decisions of this Court dealing with searches of fixed premises incident to an arrest—keeping before us the main factual features of this case, namely, that a search warrant had been refused, that an invalid arrest warrant had been issued, that the arrest (under color of the invalid warrant) came after the matter had staled for some five months with no new unfavorable showing of any kind against the suspect, that the arresting agents invaded a private dwelling in the nighttime, that they conducted what

can scarcely be regarded as anything other than a general exploratory search of the entire dwelling, and that the Government has made no showing whatsoever to rebut the obvious indications that the stale arrest was merely the pretext for just such a free-rummaging search of the petitioner's home.

Consensus indicates that *Harris* v. *United States,* 341 U. S. 145 and *United States* v. *Rabinowitz,* 339 U. S. 56 represent the farthest reach which this Court has allowed to the power of searching fixed premises without a search warrant as an incident to an arrest. Some of the plainly distinguishing features between those two cases and our case have been mentioned earlier in this brief. Let us recapitulate and enlarge upon those distinctions. *Harris,* it is true, involved a search of a dwelling, as does our case, but the search was incident to an undisputedly valid warrant of arrest, and the Court was at special pains to point out that the officers conducted the search in good faith, *i.e.,* they were not engaged in a general exploratory search (331 U. S. 149-150, 153). The Court moreover laid special stress upon the existence and good-faith use of the valid arrest warrant, saying that "This is not a case where law enforcement officials have invaded a private dwelling without authority and seized evidence of crime • • • here the agents entered the apartment under the authority of lawful warrants of arrests • • • " (331 U. S. 153). Nor does it appear that the search in *Harris* was during the nighttime. It likewise does not appear that the execution of the warrant in *Harris* was stale or unduly delayed.

Rabinowitz did not even involve search of a *home,* but of an *office,* which the Court expressly noted was a public

office (339 U. S. at 64). The Court likewise expressly noted that the search was a limited one in point of space and that the entire office premises consisted of only one room (339 U. S. at 60-64), the search being confined to that one room, which was used for the actual conduct of the criminal activity involved (339 U. S. 64). Also, *Rabinowitz* like *Harris* involved an undisputedly valid arrest warrant to which the search was incident. And it affirmatively appears in *Rabinowitz* that the execution of the arrest warrant was diligently prompt, not stale, the Government having obtained its first incriminating information concerning the suspect on February 1, 1943, its first solid proof of guilt on February 9, and the arrest warrant being issued and executed on February 16; moreover, the Government knew that the suspect had been convicted on a plea of guilty for the same or a similar offense in 1941. Nor is it to be overlooked that it is the *Rabinowitz* case which formulated the test of Fourth Amendment reasonableness on which we principally rely in this Point I of our argument, namely that the reasonableness of the search is to be tested by "the total atmosphere of the case" (339 U. S. at 60).

As for *Abel* v. *United States*, 362 U.S. 217, of the numerous features which distinguish that case from ours, we note only the following: There was a warrant of arrest which was of unquestionable validity, the search was not in the nighttime, the search was of a hotel room rather than of a permanent family domicile, and the hotel occupancy was susceptible of being viewed as having been legally "abandoned"; the Court emphasized also the propinquity of some of the items seized to the actual physical person of the suspect.

Of the cases in which this Court has disapproved searches of a dwelling incident to an arrest, we note the following: *Jones* v. *United States*, 357 U. S. 493, involved a nighttime search of dwelling premises where an illegal still was found. The agents had a daytime search warrant and no arrest warrant. Confederates of the suspected owner of the dwelling were arrested while engaged in commission of the offense at the scene, but the Court found that the Government's action in making the search had not been incident to this arrest, but on probable cause (without a nighttime search warrant) to believe that the offense was being committed and that contraband existed on the premises; this the Court found insufficient to validate the search. As regards *McDonald* v. *United States*, 335 U. S. 451 and *Johnson* v. *United States*, 333 U. S. 10, both of which disapproved a search of a dwelling incident to an arrest, and where the Court gave important if not decisive weight to the absence of any showing of justification for failure to obtain either an arrest warrant or a search warrant, we have not seen it suggested that the overruling of *Trupiano* v. *United States*, 334 U. S. 699 by *United States* v. *Rabinowitz*, 339 U. S. 56, was intended to abrogate the aforementioned feature of the *McDonald* and *Harris* cases. Nor, so far as we are aware, has any subsequent decision impaired the authoritativeness of the statement in *United States* v. *Lefkowitz*, 285 U. S. 452, 464 that "the authority of officers to search one's house or place of business contemporaneously with his lawful arrest therein upon a valid warrant of arrest certainly is not greater than that conferred by a search warrant * * *. Indeed, the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are per-

missible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime * * *." And see *Jones* v. *United States*, 362 U. S. 257, 270-271: " * * * In a doubtful case, when the officer does not have clearly convincing evidence of the immediate need for search, it is most important that resort be had to a warrant, so that the evidence in the possession of the police may be weighed by an independent judicial officer, whose decision, not that of the police, may govern whether liberty or privacy is to be invaded."

In our case, the narcotic agents chose to conduct the search upon no authority other than the "tacking" of the search upon the stale arrest warrant which was five months old. This factor of staleness was discussed at some length by Judge Waterman in his dissenting opinion in the court below (R. 109-110):

> "The events which the majority hold gave rise to a reasonable belief that the appellant was guilty of a crime under the narcotics laws on March 9, 1959 occurred in August and September of 1958. This fact casts further doubt on the validity of the majority holding here that the officers had probable cause at 8:15 P.M. on March 9, 1959 to believe that DiBella had committed a narcotics crime recently enough, or was at that moment committing one, so as to justify the warrantless arrest. It is true enough that in cases where the officer has been armed with a valid arrest warrant the rule appears to be that the warrant need not be executed at the first opportunity. But,

on the other hand, execution should not be unreasonably delayed. *United States* v. *Joines*, 258 F. 2d 471 (3 Cir.), *cert. denied*, 358 U. S. 880 (1958). The unreasonableness of a delay would depend upon the circumstances present in the particular situation, but thus far no case has been called to my attention, and I have not discovered any, where the courts have approved as reasonable an interval longer than a month between the issuance and the execution of the warrant where there has been opportunity in the meantime to make the arrest. See *United States* v. *Joines, supra* (21 days); *Seymour* v. *United States*, 177 F. 2d 732 (D. C. Cir. 1949) (6 days); *State* v. *Kopelow*, 126 Me. 384, 138 Atl. 625 (1927) (7 days); *State* v. *Nadeau*, 97 Me. 275, 54 Atl. 725 (1903) (23 days); *Kent* v. *Miles*, 69 Vt. 379, 37 Atl. 1115 (1897) (17 days). The permissible interval between the events giving rise to a narcotic agent's reasonable grounds to believe that a person has committed or is committing a narcotics crime and the agent's actual arrest of such a person was considered by the Fifth Circuit in *Dailey* v. *United States*, 261 F. 2d 870, 872 (5 Cir. 1958), *cert. denied*, 359 U. S. 969 (1959), the court stating that the arresting officer 'may defer the arrest for a day, a week, two weeks, or perhaps longer.' Surely in the present case where no new evidence was uncovered during the entire period of five months to justify the delayed arrest, we are faced with a very stale 'probable cause.' I would hold that the arrest of a person who has been under surveillance for seven months — an arrest that is made by an officer not possessed of a valid arrest warrant but which the officer seeks to justify by events that occurred five months before—is not a lawful arrest. The majority find that the knowledge the officers possessed on October 6, 1958 makes the March 9, 1959 arrest lawful, and the subsequent

> search lawful. This is the identical knowledge that Commissioner Abruzzo on October 6, 1958 found insufficient to justify the issuance of a warrant to search those very premises at a time when the information was not stale."

In addition to the authorities cited by Judge Waterman in the above quotation, we call attention to *State* v. *Mahoney*, 196 Wis. 113, 219 N. W. 380 (1928) (arrest upon a warrant—to be effected "without unreasonable delay"); *Robinson* v. *Lovell*, 238 S. W. 2d 294 (Tex. Civ. App.) (arrest upon a warrant—arresting officer must act as a reasonably prudent officer under the circumstances in avoiding undue delay in making the arrest, lest he be liable to prosecution for false imprisonment); *City of Cleveland* v. *Strom*, 67 N. E. 2d 353 (Ohio Municipal Court) (arrest upon a warrant to be executed "within a reasonable time"). And see the recent decision in *Carlo* v. *United States*, 286 F. 2d 841, 846 (C.A. 2 1961), referring to the above quoted portion of Judge Waterman's dissent herein, and saying:

> " • • • Law enforcement officers have a right to wait in the hope that they may strengthen their case by ferreting out further evidence or discovering and identifying confererates and collaborators. But every time there is delay in the making of the arrest and there is a search made as incidental to the arrest, the law enforcement officers take the risk that they will be charged with using the arrest as a mere pretext for the search. See United States v. Lefkowwitz, 1932, 285 U. S. 452, 467, 52 S. Ct. 420, 76 L. Ed. 877; Henderson v. United States, 4 Cir., 1926, 12 F. 2d 528, 51 A.L.R. 420; Worthington v. United States, 6 Cir., 1948, 166 F. 2d 557, 566; Clifton v. United States, 4 Cir., 1955, 224 F. 2d 329, 330; United States v. McCunn, D. C. S. D. N. Y., 1930, 40 F. 2d

> 295, 296; United States v. Chodak, D. C. D. Md. 1946, 68 F. Supp. 455. In other words, the delay in making the arrest is one of the factors to be taken into consideration when the time comes for a judicial determination of the question of whether or not the search was 'reasonable.' The mere fact that the arrest was not unlawful does not give law enforcement officers carte blanche to rummage about at will in any home or other place where an arrest is made and then seek to justify their conduct by a blanket statement that the 'search' made by them was incidental to an arrest. All the attendant circumstance, including the delay in making the arrest and the reason for such delay must be taken into consideration."

See also *Hobson* v. *United States*, 226 F. 2d 890 (C.A. 8, 1955), holding that there was considerable doubt whether probable cause existed on April 20, 1955 for the arrest without a warrant of a narcotic suspect who was known to have made an illegal sale on March 22, 1955; and *Wrightson* v. *United States*, 222 F. 2d 556, 560 (C.A.D.C. 1955), where the court spoke disapprovingly of a search of a residence, without a warrant, twelve days after the alleged offense.

It is submitted that the conduct of the Government officers taken in its entirety—and irrespective of whether they might technically be said to have had "reasonable grounds" within the meaning of 28 U.S.C. §7607 to have made a non-stale arrest within a due and reasonable time after the commission of the alleged offenses and the issuance of the old arrest warrant—violated the Fourth Amendment provision against unreasonable search and seizure.[26a]

[26a] The court below (R. 104) cited *Williams* v. *United States*, 273 F. 2d 781 (C.A. 9, 1960) as sustaining an arrest on "reasonable grounds" where the arrest warrant used proved to be invalid. Actually the invalid warrant was for *search* not arrest, there was *no* arrest warrant, and the arrest (by a state officer) was upheld as valid under state law.

POINT II

The search was invalid because in any event Agent Costa did not have "reasonable grounds" to make the hypothetical warrantless "Narcotic Act" arrest to which the search is sought to be "tacked" as an afterthought.

Did Agent Costa have "reasonable grounds" or "probable cause" (they are the same—see p. 34, *supra*) for arresting the petitioner, or for obtaining a warrant for his arrest,[27] even during the period of time when the alleged facts as to commission of offenses by the petitioner were sufficiently fresh to justify acting upon them for such purposes? And, even if such "reasonable grounds" did exist at some such fresher stage of the case, did they still exist on March 9, 1959 when the stale and invalid arrest warrant was executed?

The majority judges in the court below held that such reasonable grounds did exist irrespective of the factor of staleness or delay in the making of the arrest ("• • • we do not believe that the delay eradicated from Costa's mind the knowledge that he had received by September 1958 of appellant's apparent violations of the Narcotics Laws"—R. 104). By this simplistic treatment of the factor of the delay in the making of the arrest, the majority judges in the court below have brushed aside the importance of that factor, not only in its bearing upon the validity of the

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[27] It has been expressly stated that "If the information at the disposal of an arresting officer is wholly insufficient to justify the issuance of a warrant for arrest, an arrest in such a case with an invalid warrant or with no warrant at all, would be an illegal arrest". *Worthington* v. *United States*, 166 F. 2d 557, 562 (C.C.A. 6, 1948).

arrest itself, but in its bearing on the over-all action of the officers in using the stale arrest as a pretext for a warrantless exploratory search.

There is no need for us to repeat here our rather extensive presentation of the authorities pertaining to this matter of delay in the making of an arrest. See pp. 42-45, *supra*. We therefore limit our remaining discussion of the question of "reasonable grounds" for the arrest to that aspect of the question which concerns the circumstances as they existed during the time period within which the agents might have made a non-stale arrest. The remaining question, in other words, is whether the facts of which Agent Costa is supposed to have had "personal knowledge" were sufficient *at any time* to give him "reasonable grounds" for an arrest without a warrant under the Narcotic Act (26 U.S.C. §7607). Those facts, it will be recalled, were the ones that were averred by Agents Costa and Moynihan in their abortive search-warrant affidavits of October 1958. Those affidavits described alleged offenses by petitioner on August 26 and September 10, 1958 (R. 25a-31a). The majority judges in the court below evaluated the contents of those affidavits as follows (R. 102-104):

> "In the present case, Costa had not only the benefit of his own observations of the contacts and activities of appellant and Panzarella, but he also had the benefit of the information given him by Agent Moynihan as to the sales of heroin by Panzarella to Moynihan.
>
> "An examination of the affidavits of Agents Moynihan and Costa shows that both on August 26, 1958, and on September 10, 1958, appellant and Panzarella were under the surveillance of each agent. On Au-

gust 26, for instance, Panzarella agreed to sell Moynihan heroin, and stated that he had to contact his connection. He made a telephone call and then went with Agent Moynihan to 79th Street near Roosevelt Avenue in Jackson Heights. Moynihan saw Panzarella leave his vehicle, walk to 79th Street and 37th Avenue, and enter a green Chrysler automobile with New York license No. 6971NE. Moynihan saw Panzarella leave the Chrysler a few minutes later at 79th Street and Roosevelt Avenue, and saw Panzarella return to his vehicle, upon which Panzarella handed to Moynihan the envelope which proved to contain heroin. At the same time, Costa saw appellant enter the same Chrysler automobile and saw him drive to 37th Avenue and 79th Street, saw him meet Panzarella who then entered the Chrysler automobile. He saw the two men drive to 79th Street and Roosevelt Avenue and saw Panzarella leave the automobile. Costa then saw Panzarella walk to 78th Street and meet Agent Moynihan and hand a small envelope to him. The later tests showed that this envelope contained heroin.

"Likewise, on September 10, 1958, each agent saw approximately the same procedure followed between Panzarella and appellant. On the latter occasion, Panzarella, after being in contact with appellant, came back to Moynihan and sold him an ounce of heroin which he told Moynihan he obtained from DiBella. Appellant was seen meeting Panzarella, be with him briefly, and Panzarella was seen to immediately return to Moynihan with the heroin.

"Taking all of the circumstances together, we believe that there was ample evidence to hold that Costa had 'reasonable grounds to believe' that appellant had committed a violation of the narcotics laws. With all the information Costa had, both from

> his own observation and from information received from Moynihan, Costa would have indeed been naive if he did not believe that appellant had just provided the narcotics which Panzarella delivered to Moynihan. Although Costa's affidavit was based in part on hearsay, there was 'a substantial basis for crediting' the information given him by a fellow-agent, information which was wholly consistent with what Costa himself had observed. *Jones* v. *United States*, 362 U. S. 257, 269. We hold that at any time after September 10, 1958, Costa had reasonable grounds to believe that DiBella had committed a violation of the narcotics laws."

Judge Waterman, dissenting in the court below, evaluated the same affidavits as follows (R. 107):

> "What evidence is offered in this case to justify a judicial finding that Agent Costa had 'reasonable grounds' (i.e., 'probable cause') to arrest DiBella without a warrant? Agent Costa had been told of a statement by one Panzarella, a narcotics peddler, to a fellow-agent, Moynihan, a purchaser, that Di Bella was Panzarella's source of supply. The only evidence corroborating this hearsay was the fact that Costa had observed that prior to each of two sales DiBella and Panzarella had met in a car. Costa did not observe any transfer of anything between the two men. * * * "

The majority judges below cited *Draper* v. *United States*, 358 U. S. 307, 310, 313 for the doctrinal standards to be used in evaluating an officer's hearsay claim of "reasonable grounds" (R. 100-102); and they appear to have relied on *Jones* v. *United States*, 362 U. S. 257, 269, by way of more specific factual analogy (R. 103).

In the *Jones* case we find in the affidavit of Detective Didone seeking a search warrant, the following:

1. Detective Didone received information that Cecil Jones and Earline Richardson were involved in narcotics.
2. That they kept a ready supply of heroin in their apartment.
3. The informant mentioned that the narcotics were either on their person, under a pillow, on a dresser, or on a window ledge in said apartment.
4. The informant stated that on many occasions he had purchased drugs from Jones and Richardson in their apartment.
5. Jones and Richardson were familiar to the Detective and other members of the Narcotics Squad.
6. Jones and Richardson were narcotic addicts.
7. The same information regarding the illicit narcotic traffic conducted by Jones and Richardson had been given to Didone by other sources of information.
8. The informant had given Didone correct information on other occasions.

In our case, we find:

a. That in August 1958, Agent Costa saw DiBella leave his premises, enter his car, drive to 37th Avenue and 79th Street, Jackson Heights, Queens, New York, where DiBella met Panzarella. Panzarella entered the automobile and was driven to Roosevelt Avenue and 79th Street in Jackson Heights, Queens. Pan-

zarella left the car and later met Agent Moynihan and gave the agent an envelope containing heroin.

b. The same procedure was followed in September, 1958.

c. Agent Costa, the arresting officer had been told of a statement made by Panzarella, to his fellow-agent Moynihan (who was not present at the time of petitioner's arrest), that DiBella was Panzarella's source of supply.

d. Costa did not observe any transfer of anything between DiBella and Panzarella.

e. Panzarella had not given Moynihan or Costa correct information on other occasions.

f. Similar information that DiBella was a supplier of narcotics had not been given to Moynihan or Costa by other identified sources of information.

g. DiBella was not a narcotic addict.

In *Draper* v. *United States*, 358 U. S. 307 and in *Jones* v. *United States, supra,* the information given to the officers came from a reliable informant. In the present case there was no proof that Panzarella's information could be relied upon and that based on previous dealings he was a reliable informant.

In *Jones* v. *United States,* 266 F. 2d 924, 929 (C.A.D.C.), the court said:

> "The requirement that the informer be reliable stands as the only effective legal safeguard against false denunciations by irresponsible persons who may be motivated by self-interest, spite or even paranoia. The only other safeguard which remains

> rests not on law but on the good will of the police officer."

In *Jones* v. *United States* (362 U. S. at 271), Justice Frankfurter stated:

> "• • • Thus we may assume that Didone had the day before been told by one who claimed to have bought narcotics there, that petitioner was selling narcotics in the apartment. Had that been all, it might not have been enough; but Didone swore to a basis for accepting the informant's story. The informant had previously given accurate information. This story was corroborated by other sources of information. And petitioner was known by the police to be a user of narcotics. Corroboration through other sources of information reduced the chances of a reckless or prevaricating tale; that petitioner was a known user of narcotics made the charge against him much less subject to scepticism than would be such a charge against one without such a history."

In our case, there was no proof that DiBella was a user of narcotics. There was no corroboration through other sources of information. The only proof adduced by the Government to corroborate Moynihan's statement to Costa, were the two observations made by Costa when he had seen DiBella and Panzarella meet. Certainly DiBella's two meetings with Panzarella were to all outside appearances a more innocent association than the two trips Henry and his confederate made in *Henry* v. *United States*, 361 U. S. 98.

In the *Jones* and *Draper* cases, then, the information was given by a reliable informant directly to the arresting officer. In the present case, the information was alleged to have been given by Panzarella to Moynihan who then related it to Costa. This would be hearsay upon hearsay and an unwarranted extension of the rule that hearsay may be the basis for a warrant if reasonably substantiated.

The impact of this Court's leading decisions on the issue of what constitutes "reasonable grounds" or "probable cause" for an arrest without a warrant, as applied to the facts of this case, is further developed in the dissenting opinion of Judge Waterman in the court below (R. 105-107, 108-109):

> "As the majority opinion sets forth, the 'reasonable grounds' contemplated by the Narcotics Control Act, 26 U.S.C. §7607, are equivalent to the 'probable cause' required under the Fourth Amendment, *Draper* v. *United States*, 358 U. S. 307 (1959), and the quantity and quality of the evidence to substantiate 'probable cause' need not be as great as that required for a determination of guilt. *Jones* v. *United States*, 362 U. S. 257, 80 S. Ct. 725 (1960); *Henry* v. *United States*, 361 U. S. 98, 80 S. Ct. 168 (1959); *Draper* v. *United States*, *supra*, *Brinegar* v. *United States*, 338 U. S. 160 (1949); *Carroll* v. *United States*, 267 U. S. 132 (1925).
>
> "In determining whether a law enforcement officer had 'reasonable grounds' (i.e. 'probable cause') to act as he did, we should approach a resolution of the issues in the light of the historical interpretation this language of the Fourth Amendment has been accorded in the past. And, of course, we should look at the occurrence we are examining with the greater particularity when, as here, the officer, unprotected

by a prior valid judicial act, invades a family's permanent domicile in the night-time.

"The latest of the several Supreme Court summaries setting forth the philosophy underlying the meaning of 'upon probable cause' and an historical exemplification of that philosophy appears in *Henry* v. *U. S., supra.* There Justice Douglas states, 361 U. S. 98, 101, 80 S. Ct. 168, 170:

> 'And as the early American decisions both before and immediately after its [the Fourth Amendment] adoption show, common rumor or report, suspicion, or even "strong reason to suspect" was not adequate to support a warrant for arrest. And that principle has survived to this day • • • [citing cases]. Its highwater was Johnson v. United States, supra [333 U. S. 10 (1948)], where the smell of opium coming from a closed room was not enough to support an arrest and search without a warrant.'

"There have been cases where the Supreme Court has gone to some lengths to find probable cause, but I find none where the Court has justified an arrest without an arrest warrant, or approved a search without a search warrant, where the evidence of probable cause was as flimsy and as unconvincing as it is in the instant case.

"The *Carroll* and *Brinegar* cases, *supra,* dealt with violations of the federal liquor laws. Defendants in each case were arrested on the open road while transporting liquor. In each case the arresting officer had observed the defendant at some length and could attest personally to the defendant's having handled liquor. Defendants in *Carroll* had offered the officer alcohol on a previous occasion. Brinegar previously had been arrested by the same

officer for illegally transporting liquor, and in the six months preceding the arrest at issue that officer had twice seen the defendant loading liquor into a car or truck.

"*Draper* v. *United States, supra,* dealt with the specific section of the Narcotics Control Act here involved. There the arresting officer had information from a paid 'special employee' of the Bureau of Narcotics that Draper was peddling narcotics and would arrive in Denver by train carrying a shipment of narcotics. Draper was arrested as he alighted from the train.

"In *Jones* v. *United States, supra,* the question of whether the magistrate who issued a warrant had sufficient competent evidence before him in the officer's affidavit to justify issuance was decided favorably to the Government. Probable cause was there found because the officer's affidavit not only set forth information given by an unnamed informer but also stated that the officer personally knew the persons informed upon, and knew they were narcotics users. Furthermore, the informer had given reliable information in the past and the information given this time was corroborated by other informants. See 362 U. S. 267, fn. 2, 80 S. Ct. 734, fn. 2.

* * * * *

"Draper, Brinegar and Carroll were arrested when there was a real need for rapid action but even in those cases more evidence justifying arrest was introduced than here. In *Brinegar* and *Carroll* additional evidence was compiled during the period of surveillance. Here no such evidence was accumulated, and the informer Panzarella was something less than the trustworthy 'special employee' in *Draper.* This case is perhaps closest to *Jones,* but

even there more corroborating evidence was introduced, and the initial invasion of the privacy of the apartment where [fol. 110a] Jones was discovered was pursuant to a valid search warrant issued by 'an independent judicial officer.'

"It is interesting to compare the facts in the instant case with those in *Henry* v. *United States, supra*, in which the Supreme Court refused to find probable cause. In *Henry* the arrest followed surveillance by two FBI officers. Henry and a confederate had been seen making two trips transporting cartons in an automobile from a residential section of the city to a tavern. The FBI had developed an interest in Henry because the confederate had been 'implicated in interstate shipments' and in that area there had been some whiskey stolen from an interstate shipment. Henry and his confederate were stopped during the second trip and were found to be carrying stolen radios in their car. The Supreme Court reasoned that using an auto to transport small cartons was an outwardly innocent activity, and the FBI agents could not rely in justification for their acts upon an informer's story to them that Henry's confederate was implicated in a former theft of an interstate shipment. DiBella's two meetings with Panzarella were to all outward appearances a more innocent association than the two trips Henry and his confederate were making. No invasion of one's domicile was involved in *Henry*, and the Court recognized that '*Carroll* v. *United States, supra*, liberalized the rule governing searches when a moving vehicle is involved.' But even under these circumstances the Court went on to say, 'But that decision [Carroll] merely relaxed the requirements for a warrant on grounds of *practicality*. It did not dispense with the need for probable cause.' (Em-

phasis supplied.) 361 U. S. 98, 104, 80 S. Ct. 168, 172. Accord, *Rios* v. *United States*, 364 U. S. 253, 80 S. Ct. 143 (1960). See *Eng Fung Jem* v. *United States*, 281 F. 2d 803 (9 Cir. 1960). Moreover, in cases where arrests without warrant have been sought to be justified as having been made upon p- bable cause the [fol. 111a] courts of appeal have felt constrained to discover special circumstances to justify the arrests. See *United States* v. *Kancso*, 252 F. 2d 220, 224 (2 Cir. 1958); *United States* v. *Volkell*, 251 F. 2d 333, 336 (2 Cir.), *cert. denied*, 356 U. S. 962 (1958); *United States* v. *Walker*, 246 F. 2d 519, 527 (7 Cir. 1957). See also *Williams* v. *United States*, 273 F. 2d 781, 791 (9 Cir.), *cert. denied*, 362 U. S. 951 (1960) (informer was paid employee), relied on by the majority here."

Finally, as concerns more specifically the emphasis which the majority judges in the court below attached to the collaboration between Agents Costa and Moynihan and their mutual sharing of the stale investigative information (R. 102-103), it is to be noted that no citation of authority was given on the point. We think it is of interest that in the only two Federal cases we have found where such mutual cooperation or sharing of information by officers was found to support the existence of probable cause for an arrest, the suspects were arrested (without a warrant) at the very time and scene of the commission of the alleged offense, and by the very agents who were then and there cooperating in surveillance of the offense (indeed, were expecting its commission) and saw it prepared and consummated. *United States* v. *Romero*, 249 F. 2d 371 (C.A.2 1957); *United States* v. *Salli*, 115 F. 2d 292 (C.C.A.2 1940).

It is submitted that Agent Costa did not at any time have "reasonable grounds" to arrest the petitioner without a warrant pursuant to 26 U.S.C. §7607.

CONCLUSION

It is respectfully submitted that the judgment appealed from should be reversed.

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